Filed 10/24/12 Kientz v. Jarvis CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ROBERT KIENTZ et al., Plaintiffs and Respondents, v. WILLIAM JARVIS et al., Defendants and Appellants.	B228486 (Los Angeles County Super. Ct. No. BC396215)

APPEAL from a judgment of the Superior Court of Los Angeles County. Joseph R. Kalin, Judge. Reversed in part and affirmed in part.

Spierer, Woodward, Corbalis & Goldberg, Stephen B. Goldberg; Law Offices of Craig D. Weinstein and Craig D. Weinstein, for Defendants and Appellants.

Luna & Glushon and Robert L. Glushon, for Plaintiffs and Respondents.

INTRODUCTION

Respondents Robert and Sunny McMillan Kientz filed a declaratory relief action seeking a determination that appellants William and Cindy Jarvis were not permitted to regrade or remove vegetation from a "landscape easement" that ran between the parties' properties. The Jarvises, however, argued that they were entitled to trim all vegetation in the easement area to a specified height. They also filed a cross-complaint asserting that they had an easement over the Kientzs' property that permitted them to install water, sewage and other utility lines.

After a bench trial, the court ruled that: (1) the Jarvises were not permitted to regrade or build within the landscape easement; (2) the Jarvises were entitled to trim all vegetation in the landscape easement to a specified height, with the exception of three mature trees; (3) the landscape easement was exclusive, subject only to the Jarvises' trimming rights; and (4) the Jarvises had failed to establish that they had either an express or implied easement to install a sewer line or other utilities over the Kientzs' property. The trial court entered judgment and awarded the Kientzs attorneys' fees and costs pursuant to a provision in the landscape easement.

The Jarvises appeal the trial court's judgment and its order awarding attorneys' fees. We reverse the trial court's findings that the Jarvises are prohibited from trimming mature trees in the landscape easement and that the easement is exclusive in nature. We also strike the portion of the judgment addressing whether the Jarvises established an implied easement. We affirm the remainder of the judgment. Because we have reversed portions of the judgment, we also reverse the attorneys' fees award and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

A. Events Preceding the Parties' Complaints

1. Description and initial sale of properties

William Boehringer owned two parcels of property that shared an eastern/western boundary. The first property was an undeveloped hillside lot on Harold Way that sloped

downward from west to east (Harold Way property); the second property was immediately east of the Harold Way property and included a single family residence accessible from North Kings Road (North Kings property). The eastern edge of the Harold Way property was steeply graded and ran downward to the western edge of the North Kings property. In January of 2004, the City of Los Angeles approved a plan to build a residence on the Harold Way lot. As part of the conditions of approval, Boehringer agreed to regrade portions of the hillside that ran toward the western boundary of the North Kings property.

In August of 2004, Paris Hilton entered into a contract to purchase the North Kings property. At the time of the purchase, Boehringer had not begun any construction on the Harold Way property. Hilton was concerned that if Boehringer developed the property, residents of the new structure would be able to see into the pool area of the North Kings property. To remedy these privacy concerns, Boehringer agreed to establish a "landscape easement" over a ten-foot wide section of land along the eastern boundary of the Harold Way property that contained vegetation, several mature trees and a rock wall "water feature."

Boehringer hired a consultant to analyze whether the easement would provide privacy to individuals on the North Kings property. This "privacy analysis" assumed that the lowest level of any residence constructed on the Harold Way property would be built at an elevation of 567 feet. The analysis concluded that if the vegetation within the easement were maintained at a height of 24 inches above the lowest level of the Harold Way residence, a six foot tall man would not be able to see into the North Kings property. The analysis also concluded that maintaining the vegetation at such a height would preserve the Harold Way property's city views. After reviewing the privacy analysis, Hilton's real estate agent requested that Boehringer raise the vegetation trimming height to 40 inches above the lowest level of the Harold Way residence and Boehringer agreed.

Pursuant to their agreement, Boehringer, acting as both grantor and grantee, prepared a grant deed conveying a landscape easement to the North Kings property: "Grantor [the owner of the Harold Way property] hereby Grants to Grantee [owner of the

North Kings property] a non-exclusive easement for maintenance of landscaping, existing water feature and utility lines under, over and across [the land described in the easement area]. . . . [¶] . . . [¶] Grantee shall maintain control of the irrigation system as well as maintenance of plant material within the [easement area]. Notwithstanding anything to the contrary contained in the foregoing, (i) Grantor shall be responsible for the initial installation of plant material and an irrigation system within the [easement area] and guarantee all plant material for one [] full year following the date of installation of the same and (ii) Grantor shall be entitled to regularly trim/prune the top of all plant vegetation in the [easement area] to a level that shall not be lower than 40 inches above the lower floor level of any residence constructed on [the Harold Way property] in order to maintain city views."

Boehringer signed a grant deed transferring the North Kings property to Hilton on November 18, 2004, which included a description of the landscape easement. Boehringer signed the deed conveying the landscape easement on December 20. That same day, Boehringer signed a second deed granting the Harold Way property a "non-exclusive easement for maintenance of drainage, water, sewer and other utility lines under, over and across" a portion of the northeastern corner of the North Kings property. The grant deed transferring ownership of the North Kings property to Hilton did not reference this sewer easement. Three days later, on December 23, 2004, a title company simultaneously recorded the grant deed transferring ownership of the North Kings property to Hilton and the two easement grants.

Around the time Hilton took possession of the North Kings property, additional trees were planted within the landscape easement area and an irrigation system was installed. After Hilton took possession, she maintained the vegetation and irrigation system in the easement area, as well as the preexisting water feature.

In March of 2007, which was approximately two years after Hilton purchased the North Kings property, Boehringer sold the Harold Way property to William and Cindy Jarvis. At the time of the sale, the property remained undeveloped.

2. The Kientzs' Purchase of the North Kings Property and the Jarvises Proposed Development of the Harold Way Property

In September of 2007, Robert and Sunny McMillan Kientz purchased the North Kings property from Hilton. During the inspection period, Hilton's real estate agent, Mauricio Umansky, provided the Kientzs a copy of the landscape easement and the "privacy analysis." The Kientzs were also told that a row of seedling trees had been planted pursuant to the terms of the landscape easement. At the time of the purchase, the Kientzs were aware that the Harold Way property was vacant and that the owner might decide to build a residence. The Kientzs were not told, however, that the owner of the Harold Way property had a recorded sewer easement over a portion of the North Kings property.

Approximately two months after purchasing their new home, the Kientzs saw a notice indicating that a house was to be constructed on the Harold Way property. The notice identified David Wright, who had partnered with the Jarvises to develop the Harold Way property, as the owner. The Kientzs met with Wright to discuss the proposed development. Wright indicated that he intended to regrade the landscape easement, which would require him to remove and replace all of the vegetation, the existing irrigation system and certain other structures. The Kientzs also discovered that Wright's construction plans included structures that would encroach into the easement. Although Wright was aware of the landscape easement, he believed that such actions were permitted under the language of the easement.

Following this meeting, the Kientzs sent Wright and the Jarvises a letter explaining that their current construction plans violated the easement. In response, Wright informed Kientzs' counsel that the City of Los Angeles had imposed conditions on the development of the Harold Way property that required him to regrade the hillside in the easement area. Kientzs' counsel insisted that the city would modify that requirement if it was informed of the easement.

Wright consulted with his architects and engineers to redesign the project in a way that would avoid regrading or placing any structures within the easement area. On

September 29, 2008, Wright's architect completed plans for the new design. Several weeks later, his engineer completed a report analyzing an alternative means of grading the Harold Way property that would not affect the easement. The engineer submitted the report to the City of Los Angeles, who issued a modification permitting construction without grading the easement. Under these revised construction plans, the lowest level of the Harold Way residence would sit at an elevation of approximately 560 feet.

B. The Parties' Pleadings

1. Complaint and cross-complaint

While Wright was working to revise the design of the Harold Way residence, the Kientzs filed a declaratory relief action seeking a determination of the parties' respective rights under the landscape easement. The complaint, which was filed on August 12, 2008, alleged that the Jarvises were not permitted to "perform any construction or grading that would cause removal, destruction or damage to the existing landscaping including trees, vegetation and foliage; water features; irrigation; and utility lines within the Easement area." It also alleged that the Kientzs were entitled to maintain the existing landscaping within the easement area.

The Jarvises' answer admitted that their original construction plans violated the easement, but contended that they had reached a subsequent agreement "whereby [they] would modify their proposed building plans so that no improvements would be constructed in the area described in the Easement Agreement." The Jarvises also filed a cross-complaint seeking a determination that they had an easement entitling them to install sewer and other utility connections along the northern corner of the North Kings property. The Kientzs denied the existence of any such easement.

2. The Jarvises' Motion for Summary Judgment

In September of 2009, the Jarvises filed a motion for summary adjudication arguing that the issues raised in the Kientzs' declaratory relief action were either "moot or not supported by the plain language of the Easement Agreement." In their statement of undisputed material facts, the Jarvises admitted that Boehringer had previously

complied with the landscape easement's requirement that the owner of the Harold Way property install landscaping and an irrigation system, thereby giving rise to the North Kings property owner's right to maintain the vegetation and irrigation systems within the easement. The Jarvises argued, however, that their revised construction plans demonstrated that they did not intend to grade or otherwise encroach on the easement in any way. As a result, there was no need for the court to decide whether the easement prohibited them from engaging in such conduct.

The Jarvises further contended that the only other remaining issue – whether they were permitted to cut vegetation in the easement area – was resolved by the language of the easement agreement. According to the Jarvises, the easement provided a clear right to cut all vegetation to a height of 40 inches above the lowest level of any residence constructed on the Harold Way property.

The Kientzs opposed the motion on several grounds. First, they argued that the Jarvises had not entered into any sort of binding agreement that would prohibit them or future owners of the Harold Way property from developing within the easement. As a result, the Kientzs contended that they were entitled to seek a determination of rights that would permanently prohibit such conduct. Second, the Kientzs argued that the 40 inch height trimming requirement was not intended to apply to mature trees existing within the easement area. More specifically, the Kientzs argued that the term "trim/prune . . . the top of all plant vegetation" did not permit the "destruction of 30-year old trees."

The trial court denied the motion for summary judgment and the case proceeded to a bench trial. The Kientzs' trial brief identified three primary issues that required resolution: (1) whether the Jarvises were permitted to regrade or build within the landscape easement; (2) whether the "trim/prune" language permitted the Jarvises to cut down significant portions of mature trees located within the easement area; and (3) whether the recorded sewer easement benefitting the Harold Way property was valid.

C. Trial and Judgment

1. Testimony at trial

Robert Kientz, David Wright and William Jarvis all testified at trial. Kientz stated that he had reviewed the landscape easement and privacy analysis prior to purchasing the North Kings property. Based on these materials, he believed that the owner of the Harold Way property was prohibited from removing trees from the easement area or otherwise encroaching in the easement. He also testified that the grant deed for the North Kings property did not include any reference to the sewer easement and that his title company had failed to notify him that any such easement had been recorded.

Wright testified that although he was aware of the landscape easement, he did not believe that the language of the easement barred construction or grading within the easement area. Nevertheless, after meeting with the Kientzs, he and the Jarvises elected to change their redesigned construction plans to avoid building within the easement. However, Wright also admitted that, depending on the outcome of the legal proceedings, they might revert to their original construction plans or sell the land to a third party who might try to build within the easement. In regards to the sewer easement, Wright stated that the grant deed to the Harold Way property referred to the easement and that he had made sure that the easement had been recorded prior to finalizing the purchase.

Jarvis's testimony supported many of Wright's statements. Jarvis explained that he and his wife had voluntarily agreed to redesign the Harold Way construction plans in a manner that did not encroach on the easement or require any grading within that area. Jarvis also acknowledged that, while improbable, it was conceivable that they might revert to their original plans if they prevailed in the lawsuit. Jarvis also stated that they intended to cut all of the vegetation in the easement area to a level of 40 inches above the elevation of the lowest level of the house.

Neither William Boehringer nor Paris Hilton testified at the trial. Mauricio Umansky, Hilton's real estate agent, was the only trial witness who had any knowledge of the transaction between Boehringer and Hilton. Umansky testified that the purpose of the landscape easement was to balance Hilton's interest in privacy and Boehringer's

interest in maintaining city views from the Harold Way property. Umansky acknowledged that the plain language of the easement appeared to permit the owner of the Harold Way property to cut all vegetation in the easement area – including any trees – to a height 40 inches above the lowest level of any future residence built on the property. He also acknowledged that the easement did not require the owner of the Harold Way property to place the lower level of any future residence at a specific elevation. Umansky did believe, however, that the purpose of the easement would be frustrated if the lowest level of the residence was placed at an elevation that would effectively permit the cutting of all vegetation to a level of 40 inches from the ground. In regards to the sewer easement, Umansky stated that Boehringer never mentioned the sewer easement to him and, to his knowledge, Paris Hilton was never notified of the easement.

The Kientzs also called an arborist, who testified that if the mature trees in the easement area were cut to a height of three to five feet from the ground, they would likely die. The arborist also testified that cutting the trees down to that height would not constitute "pruning," as that word is commonly used among professional arborists.

The only other witnesses who testified were a surveyor, who confirmed that Jarvises' original design of the Harold Way residence would have encroached on the easement, and a land use consultant who testified about various permits issued in conjunction with development on the Harold Way property.

2. Trial court's ruling

a. The court's minute order

On February 22, 2010, the trial court issued a minute order that prohibited the Jarvises from: (1) "grad[ing] the land within the easement area"; (2) "encroach[ing] upon or into said easement with their . . . construction"; or (3) removing vegetation or structures "within the easement . . . prior to completion of construction of the house . . . [on the Harold Way property]." The order clarified, however, that "[u]pon completion . . . of the house . . . , defendants can then regularly trim and prune the tops of plant vegetation to a level not lower than 40 inches above the lower floor level, excepting three mature trees [in the easement area]. The Court does not believe . . . that the parties

intended to remove existing thirty year old trees." The order further clarified that the Kientzs were permitted to "maintain the landscaping . . . and other [improvements] within the easement subject to [the Jarvises'] interest to trim and prune the vegetation."

In explaining why it did not believe the Jarvises' trimming rights applied to mature trees within the easement area, the court stated that the landscape easement was intended to establish "a visual barrier creating reasonable city views to the defendants and reasonable privacy for the plaintiffs. The Court does not interpret the easement to give defendants a completely unobstructed view of the city. The Court's reading of the easement believes a reasonable interpretation would be to put the parties in a position that neither side would be the recipient of all the burdens or benefits of the easement."

The court also explained why it had ordered that no trimming could occur until construction on the Harold Way residence had been completed: "The necessity of this order is founded on the basis that it will be unknown until the completion of construction as to the determination of the lower floor level of the residence. . . . The Court's interpretation of the 'lowest level of the residence' is the floor of the lowest habitable room, which would not include a pool room, garage or wine cellar. A media room would be considered a habitable room."

On the Jarvises' cross-claim regarding the sewer easement, the court concluded that the easement was invalid because the evidence showed Boehringer granted the easement while the North Kings property was in escrow without ever notifying Hilton. The court also explained that it could not determine whether "there could be an easement by necessity to run the sewer/utility lines through plaintiffs' Kings Road property. The Court has no evidence of defendants' inability to hook up with the sewer and utility lines on Harold Way. Nor does the Court have any evidence that there would be a severe hardship or excessive costs to connect/the sewer utility lines to the connections on Harold Way."

b. The trial court's judgment

On May 5, the court entered a judgment reflecting the findings in the minute order. The judgment stated that the Kientzs were entitled to "the exclusive use of [the landscape

easement] . . . for landscape maintenance and use of irrigation . . . and other existing improvements." The judgment further provided that, after a "completion of construction of a house and any pool or other structures on the [Harold Way] property," the Jarvises were permitted to "regularly trim and prune the tops of plant vegetation to a level not lower than 40 inches above the floor of the lowest habitable room, not including any pool room, garage, wine cellar, but including a media room or other habitable rooms. . . . The right to trim and prune shall not include the following three trees: [¶] A. Black acacia . . . approximately 15 feet in height; [¶] B. Ficus . . . approximately 17 feet in height; [¶] C. Mock orange . . . approximately 20 feet in height."

Except as described in the trimming provisions, the Jarvises were otherwise "permanently enjoined from any removal or destruction of any existing landscaping[,] including trees, vegetation, plant material, the water feature; irrigation system and utility lines" and "from encroaching onto [Landscape Easement] with the construction of any pool, decking, stairs or other construction."

Finally, the judgment stated that the Jarvises did "not have a valid easement for maintenance of drainage, water, sewer and other utility lines."

c. Summary of statement of decision

At the request of the Jarvises, the court provided a statement of decision explaining the basis for its judgment. The statement, which the Kientzs drafted, began by noting that several terms in the landscape easement were ambiguous. First, the court found that it was unclear whether the phrase "trim/prune the top of all plant vegetation" was intended to provide a right to "cut back parts [of vegetation] for better shaping or more fruitful growth," or whether such right "allows the cutting of large diameter branches of a mature trees to stubs, and severing trees and plants above a certain level regardless of the effect of such trimming/pruning to the trees and plants below that level." The court also believed it was unclear "whether trimming and pruning may allow for the outright removal and destruction of the vegetation which provides the landscape buffer between the properties." The court also found that the phrase "maintain city views" was

ambiguous because the language "could be interpreted to mean either partially obstructed city views or totally unobstructed city views."

The court next explained the basis for concluding that the easement did not permit any trimming or pruning "prior to the completion of construction of a house on the Harold Way Lot." According to the court, the easement "bases the elevation at which the Harold Way Lot owner can 'trim/prune' vegetation . . . on 'the lower floor level' of a residence constructed on the Harold Way Lot. . . . [¶] Until completion of construction of any residence, there is no 'lower floor level' of a residence upon which to base the trimming and pruning."

In explaining why it had excluded mature trees from the trim/prune provision, the court stated that "at the time the Landscape easement was created, the parties did not intend that existing thirty year old trees would be removed or cut down. Accordingly, three mature trees . . . are not . . . subject to . . . [the] limited trim/prune rights." The court noted that Hilton's real estate agent testified that the intent of the easement was to "provide a privacy barrier of vegetation to benefit Hilton in her backyard and pool area. Based on [the agent's] testimony regarding negotiations with Boehringer over creation of the [easement], . . . the existing thirty year old trees were not to be removed or destroyed. [¶] Hilton had a privacy analysis performed prior to her purchase of the Harold Way Lot to ensure the Landscape Easement would provide sufficient privacy to the Kings Road Property."

The court also explained why it believed the "sewer/utility easement" was "invalid." According to the court, the evidence showed that: (1) Boehringer granted the sewer easement to himself while the North Kings property was under a contract of sale; (2) Hilton's grant deed did not "include a reservation for the Sewer Utility Easement"; and (3) "[t]he uncontroverted testimony of [Hilton's agent] demonstrate that Hilton was not made aware of, nor did she consent to, the purported Sewer/Utility Easement prior to . . . the close of escrow."

Finally, the court found that the Jarvises did "not have a Sewer/Utility Easement by necessity," explaining that they "offered insufficient evidence of their inability to

hook up with any sewer and/or utility lines on Harold Way," and failed to "demonstrat[e] a severe hardship or excessive costs to connect the sewer utility lines to any connections on Harold Way."

d. Kientzs' motion for attorneys fees

Following the entry of judgment, the Kientzs moved for attorneys' fees and costs pursuant to a provision in the landscape easement stating: "In the event of any controversy, claim or dispute relating to this Agreement, or the breach thereof, the prevailing party shall be entitled to recover from the losing party reasonable costs, expenses and attorneys fees." The Kientzs requested approximately $154,000 in attorneys' fees and $34,000 in costs.

The Jarvises argued that the Kientzs should not be treated as the prevailing party because: (1) the trial testimony indicated that the Jarvises did not intend to grade the easement, construct within the easement or otherwise interfere with the Kientzs' ability to maintain the vegetation and irrigation system within the easement, and (2) the court's ruling regarding the 40 inch trimming provision was essentially "a draw" that provided each party a partial victory. Alternatively, the Jarvises argued that $154,000 in attorneys' fees was unreasonable given the "limited scope" of the case and that several of the Kientzs' costs – including expert fees – were not recoverable. The trial court, however, granted the motion and awarded the Kientzs approximately $125,000 in attorneys' fees and $21,000 in costs.

The Jarvises appeal the trial court's judgment and order awarding attorneys fees.

DISCUSSION

A. The Trial Court Erred in Interpreting Portions of the Landscape Easement

The Jarvises have appealed two issues related to the trial court's interpretation of the landscape easement. First, they argue that the court erred in concluding that the "trim/prune" provisions did not apply to "three tall trees" within the easement area.

Second, they assert that the trial court erred in concluding that the easement is exclusive, rather than nonexclusive.

The Jarvises have not appealed the other portions of the trial court's interpretation of the easement, including its findings that: (1) the 40-inch vegetation trimming height is to be based on the elevation of the lowest floor level of any future residence that is constructed on the Harold Way property; (2) the phrase "lowest floor level" means inhabitable floor, and does not extend to a gym or pool house; (3) no vegetation within the easement may be trimmed or pruned until after a house is constructed on the Harold Way property; and (4) the Jarvises may not regrade the easement or build any portion of their house or any related structure within the easement.

1. Standard of review

A grant deed conveying easement rights is interpreted in the same manner as a contract. (Civ. Code, § 1066; *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 521; see also *Scruby v. Vintage Grapevine, Inc.* (1995) 37 Cal.App.4th 697, 702 (*Scruby*) ["In construing an instrument conveying an easement, the rules applicable to the construction of deeds generally apply."].) "In reviewing the trial court's construction of [a] contract . . ., several different standards of review may apply, if a party offers parol evidence to aid in interpretation. [Citation.] '. . .[T]he trial court's threshold determination of ambiguity is a question of law [citation] and . . . thus subject to our independent review [citation].' [Citation.]" (*Roden v. Bergen Brunswig Corp*. (2003) 107 Cal.App.4th 620, 624-625 (*Roden*).) If the parol evidence is in conflict, the substantial evidence standard of review applies to the court's factual findings. (*De Anza Enterprises v. Johnson* (2002) 104 Cal.App.4th 1307, 1315.) Under that standard, we view the court's factual findings in favor of the prevailing party and in support of the judgment, and we resolve all conflicts in the evidence in favor of the judgment. (*Heard v. Lockheed Missiles & Space Co*. (1996) 44 Cal.App.4th 1735, 1747.) "'However, when . . . the competent parol evidence is not conflicting, construction of the instrument is a question

of law, and the appellate court will independently construe the writing. [Citation.]' [Citation.]" (*Roden, supra,* 107 Cal.App.4th at p. 625.)

2. The trial court erred in interpreting the trim/prune provision of the landscape easement

The Jarvises contend that the trial court erred in interpreting the following provision of the landscape easement: "[the owner of the Harold Way property] shall be entitled to regularly trim/prune the top of all plant vegetation in the [easement area] to a level that shall not be lower than 40 inches above the lower floor level of any residence constructed on [the Harold Way property] in order to maintain city views." The trial court concluded that there was an ambiguity as to whether the parties intended this provision to apply to mature trees within the easement area. After receiving extrinsic evidence on the issue, the court concluded that the parties intended to exclude trees from the trimming provision.

The Jarvises argue that the court committed two errors in interpreting the "trim/prune" provision. First, they assert that the court erred in admitting extrinsic evidence to aid in the interpretation of the trimming provision. Second, they argue that the extrinsic evidence does not support the trial court's finding that the parties intended to exclude trees from the trimming provision.

a. The court did not err in considering extrinsic evidence

The Jarvises contend that the trial court should not have admitted any extrinsic evidence to aid in determining whether the trimming provision was intended to apply to mature trees within the easement area. The Jarvises assert that the provision plainly states that the right to trim and prune extends to "all plant vegetation," which necessarily includes trees.

When an easement arises from an express grant, the "the scope and extent of the easement is to be determined by the terms of the grant." (*Norris v. State ex rel. Dept. of Public Works* (1968) 261 Cal.App.2d 41, 45 (*Norris*); Civ. Code, § 806.) The primary objective "'is to ascertain and carry out the intention of the parties.'" (*City of Manhattan*

Beach v. Superior Court (1996) 13 Cal.4th 232, 238.) If the language of an easement grant "is clear and explicit . . ., there is no occasion for the use of parol evidence to show the nature and extent of the rights acquired. [Citations.] " (*Scruby, supra,* 37 Cal.App.4th at p. 702.) However, "[i]f the language is in any respect uncertain or ambiguous," the court may consider extrinsic evidence "to the end that the intention of the parties may be ascertained and given effect." (*Eastman v. Piper* (1924) 68 Cal.App. 554, 561.)

"[E]xtrinsic evidence is admissible to demonstrate that there is an ambiguity in an instrument and for the purpose of construing this ambiguity." (*LaCount v. Henzel Phelps Constr. Co.* (1978) 79 Cal.App.3d 754, 770 (*LaCount*).) "'The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.'" (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 435.)

Here, the Kientzs sought to admit extrinsic evidence that would purportedly show the parties did not intend the trimming provision to extend to trees within the easement area. Specifically, the Kientzs asserted that the evidence would show that: (1) trimming the trees to the height described in the easement – 40 inches – would result in the trees' removal; and (2) removing the trees would leave the North Kings property without a sufficient privacy barrier, thereby undermining the purpose of the easement. The court allowed the evidence, explaining that it was unclear whether the language "trim/prune" was intended to allow the owner of the Harold Way property to "cut . . . mature trees to stubs" or to "sever[] trees" in a manner that might "allow for their outright removal and destruction."

The trial court did not err in admitting extrinsic evidence to aid in the interpretation of the trimming provision. Our courts have emphasized that extrinsic evidence may be considered unless it is determined that, "as a matter of law, [the instrument] is so clear that reasonable minds cannot differ as to its interpretation, and that it means only one thing." (*Denver D. Darling, Inc. v. Controlled Environments Const., Inc.* (2001) 89 Cal.App.4th 1221, 1235; see also see also *LaCount, supra,* 79 Cal.App.3d

at p. 770 [California recognizes "broad" exceptions to the parol evidence rule].) We are not persuaded that, as a matter of law, reasonable minds cannot differ as to whether a provision permitting a party to "trim/prune" vegetation to a height of 40 inches was intended to apply to mature trees that greatly exceed that height. Therefore, the trial court properly considered extrinsic evidence to aid in determining the parties' intent.

b. The extrinsic evidence does not support the trial court's interpretation of the easement

The Jarvises next contend that, contrary to the trial court's finding, the extrinsic evidence presented at trial does not show that the parties intended to exclude trees from the trimming provision. The trial court's statement of decision includes the following finding: "[t]he court finds that at the time the Landscape Easement was created, the parties did not intend that existing thirty year old trees would be removed or cut down. Accordingly, three [] mature trees . . . are not subject to Defendants' limited trim/prune rights." The court cited the following evidence in support of this "finding": (1) Hilton's real estate agent, Umansky testified that the easement was "created to provide a privacy barrier of vegetation to benefit Hilton in her backyard and pool area," thereby demonstrating "the existing thirty year old trees were not to be removed or destroyed;" and (2) "Hilton had a privacy analysis performed prior to her purchase of the Harold Way Lot to ensure the Landscape easement would provide sufficient privacy the Kings Road property."

The record does not contain any evidence, conflicting or otherwise, that supports the court's finding that the parties intended to exclude mature trees from the trimming provision. The Kientzs have not identified a single statement – either written or oral – indicating that Boehringer, Hilton or Umansky believed that, despite its broad wording, the trimming provision was not meant to apply to mature trees.

The two pieces of evidence the trial court cited in its statement of decision – Umansky's testimony and the privacy analysis – also do not demonstrate an intent to exclude trees from the trimming provision. To the extent these two categories of

evidence have any relevance to the intended scope of the trimming provision, they appear to support the view that the trees were subject to the trimming provision. On two separate occasions, Umansky testified that he understood the language of the trimming provision to apply to all vegetation within the easement area, including trees. The privacy analysis, on the other hand, contains four sketches. The first sketch provides an overhead view of the easement and shows three mature trees located within the easement. The three subsequent sketches provide a side view of the easement and contain a line delineating the "maximum height of foliage per landscape maintenance easement." In all three sketches, there is no vegetation extending above this "maximum height line," thereby implying that the trees, like other vegetation in the easement, were subject to the trimming provision.

The record also contains no evidence supporting additional factual findings implicit in the trial court's interpretation of the trimming provision. The trial court's minute order and statement of decision indicate that it did not believe the trimming provision applied to mature trees within the easement area because: (1) the trees were likely to die if they were cut to the height described in the trimming provision, thereby requiring their removal; (2) if the mature trees were removed, the owners of the North Kings property would no longer have a sufficient privacy barrier, which would defeat the purpose of the easement. The record contains no evidence supporting either finding.

First, the only evidence regarding the effect of trimming the mature trees to the height described in the easement came from an arborist, who testified that cutting the trees to a height of three to five feet from the ground would likely kill them. There is, however, no evidence demonstrating that the landscape easement would actually permit the Jarvises to trim the mature trees to that minimal height. Based on the language of the easement, the height to which the mature trees can be trimmed will depend on the elevation of the lowest level of any residence constructed on the Harold Way property. The evidence at trial is illustrative. In Boehringer's initial design, the lower level of the Harold Way residence was to sit at an elevation of 567 feet. Under the Jarvises' more recent design, the lower level would sit at an elevation of approximately 560 feet.

Presumably, under Boehringer's design, the trimming height of the vegetation in the easement area – including the mature trees – would be seven feet higher than the trimming height under the Jarvises' design. Thus, the height at which the trees will be cut cannot be known without also knowing the elevation of the lower floor of the future Harold Way residence.

Given the topography of the Harold Way property and the landscape easement, the height to which the mature trees can be trimmed is also dependent on their location within the easement area. The parties do not dispute that the easement descends steeply from west to east, meaning that the land on the western side of the easement has a higher elevation than land on the eastern side of the easement. As a result, the base of trees located on the eastern side of the easement would have a lower elevation than the base of trees located on the western side of the easement. Therefore, under the trimming provision, trees along the eastern portion of the easement would presumably be permitted to grow several feet higher than those located along the western area of the easement. There is no testimony explaining where the three mature trees are positioned within the easement or how this effects their height in relation to the lower level of any future Harold Way residence.

No witness in this case attempted to calculate the heights at which the trees might actually be cut. The Kientzs, for example, could have utilized an expert to explain what height the trees would be cut at assuming that the lower level of the Harold Way residence were placed at various different elevations. Those elevations might have included 560 feet (the Jarvises' most recent design), 567 feet (Boehringer's initial design) or any other reasonable elevation. Without such evidence, no conclusions can be drawn from the arborists' statement that the trees would die if cut to a height of 36 to 60 inches from the ground. Therefore, the court's finding that the trees would likely die if trimmed in the manner described in the landscape easement finds no factual support.

The second factual finding underlying the trial court's interpretation is that removal of the mature trees (which, as discussed above, might not occur) would leave the owners of the North Kings property without a sufficient privacy barrier, which was the

purported purpose of the landscape easement. There is no evidence, however, explaining how the removal of the trees would affect the sight lines between the Harold Way and North Kings properties. While a court could speculate that removing the trees would reduce the privacy level, there is no evidence that it would actually do so.[1]

In sum, the record contains no evidence demonstrating that: (1) the parties discussed or otherwise intended to exclude trees from the trimming provision; (2) trimming the trees to the height described in the trimming provision would likely result in their removal; or (3) removing the trees would substantially impact the privacy of the North Kings property. Accordingly, there was no basis for the trial court's conclusion that the extrinsic evidence showed that the trimming provision, which, by its terms, applies to "all plant vegetation," was not intended to apply to trees.

3. *The trial court erred in describing the landscape easement as "exclusive"*

The Jarvises also argue that the trial court erred when it included language in the judgment stating that the Kientzs are "entitled to the exclusive use of" the landscape easement. The court's statement of decision includes similar language, stating that the Kientzs are "entitled to the exclusive use of the [L]andscape Easement with its existing irrigation system, water feature and other improvements previously installed, subject only to Defendants' limited rights to trim/prune some of the vegetation in the Landscape Easement area." The Jarvises contend that the court erred in interpreting the grant deed as providing an exclusive, rather than nonexclusive, easement.

An exclusive easement is generally defined as "[a]n easement that the holder has the sole right to use." (Black's Law Dictionary (9th ed. 2004) at p. 587.) A "nonexclusive easement," also known as a "common easement," is generally defined as

---

[1] There is also no evidence supporting the trial court's additional finding that the Harold Way property would retain reasonable city views even if the trees were excluded from the trimming provision. The Kientzs did not offer any evidence describing the extent to which the trees obscure the views from the Harold Way property.

"[a]n easement allowing the servient landowner to share in the benefit of the easement." (*Id*. at p. 586.) The California Supreme Court has explained that "an 'exclusive easement' is an unusual interest in land; it has been said to amount almost to a conveyance of the fee. [Citation.] No intention to convey such a complete interest can be imputed to the owner of the servient tenement in the absence of a clear indication of such an intention." (*City of Pasadena v. California-Michigan Land & Water Co.* (1941) 17 Cal.2d 576, 578-579.) The general rule is that "[w]here the easement is founded upon a grant, . . . only those interests expressed in the grant and those necessarily incident thereto pass from the owner of the fee. . . . [D]espite the granting of an easement, the owner of the servient tenement may make any use of the land that does not interfere unreasonably with the easement. [Citations.] It is not necessary for him to make any reservation to protect his interests in the land, for what he does not convey, he still retains." (*Id*. at p. 579.)

The first line of the grant establishing the landscape easement expressly states that it was intended to be nonexclusive in nature: "[the owner of the Harold Way property] hereby Grants to [the owner of the North Kings property] a non-exclusive easement for maintenance of landscaping, existing water feature and utility lines under, over and across [the land described in the easement area]." Paragraph 4 of the easement further states that the "[g]rantee shall maintain control of the irrigation system as well as maintenance of plant material within the [easement area]" and that the grantor "shall be entitled to regularly prune/trim the top of all plant vegetation in the [easement area] to a level that shall not be lower than 40 inches above the lower floor level of any residence constructed on Grantor's real; property."

The language of the grant demonstrates that Boehringer, the grantor, intended to provide a nonexclusive easement under which the grantee, the owner of the North Kings property, was given the right to control the irrigation system and maintain the vegetation within the easement area, subject to the grantor's right to trim the vegetation in the manner described in paragraph 4. Because the easement is expressly nonexclusive in nature, the owner of the Harold Way property is permitted to make any use of the

easement area that does not interfere with the grantee's right to maintain the irrigation system, the vegetation, the water feature and the utility lines within the easement. The determination that the parties created an "exclusive easement" is reversed.

B. The Trial Court Did Not Err in Ruling That the Jarvises Failed to Establish the Validity of the Sewer Easement

The Jarvises argue that the trial court erred in ruling that they failed to establish the validity of an express easement permitting them to install a sewer and other utilities along the northern section of the North Kings property.

1. Summary of the evidence and trial court's ruling

The evidence at trial demonstrated the following facts regarding the sewer easement. In August of 2004, William Boehringer and Paris Hilton signed a contract of sale for the North Kings property. On November 18, 2004, Boehringer signed a grant deed that purportedly transferred the North Kings property to Paris Hilton. The grant deed included a description of the North Kings lot and the landscape easement. The deed did not indicate that the property was burdened by a sewer easement.

On December 20, 2004, Boehringer, acting as both grantor and grantee, signed two deeds conveying easement rights. In the first deed, Boehringer granted the North Kings property a landscape easement over the Harold Way property. In the second deed, he granted the Harold Way property a "non-exclusive easement for maintenance of drainage, water, sewer and other utility lines under, over and across" a portion of the North Kings property. In both grants, Boehringer described himself as the owner of the Harold Way and North Kings properties. On December 23, 2004, a title company recorded the grant deed transferring the North Kings property from Boehringer to Paris, along with both easement grants. At some point after recordation, the escrow period ended and the grant deed to the North Kings property was delivered to Hilton.

At trial, Hilton's real estate agent testified that he was never informed of the sewer easement and that, to his knowledge, Hilton was never informed of the easement. The Jarvises did not present any evidence contradicting this testimony or otherwise indicating

that Hilton received notice of the sewer easement at any time prior to taking possession of the property.

The trial court concluded that the Kientzs had failed to establish the validity of the recorded sewer easement. According to the court, "Boehringer could not impose the burden of an easement on the kings Road property as servient tenement when he had already conveyed the property to Paris Hilton without notice to her and free of the easement."

2. Standard of Review and burden of proof

To the extent that material facts are not in dispute, the trial court's ruling regarding the validity of the easement "constitute[s] a determination[] of law that we review de novo." (*Blackmore v. Powell* (2007) 150 Cal.App.4th 1593, 1598, fn. 2.) Where facts are disputed, we review the trial court's factual findings for the existence of substantial evidence. (*Van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 562, 6 Cal.Rptr.3d 746.) Generally, a "party claiming [an] easement" has the "burden of proving" all the "elements essential to establish" its existence. (See *O'Dea v. County of San Mateo* (1956) 139 Cal.App.2d 659, 661 (*O'Dea*); see also 28A C.J.S. Easements § 170 ["the burden is on the party asserting a claim to an easement to prove it"].)

3. The trial court did not err in ruling that the recorded sewer easement was not enforceable

The Jarvises contend that Boehringer had "the right and power" to grant an easement over the North Kings property until title transferred to Hilton. They further allege that title to the property did not pass to Hilton until "all the conditions of escrow [were] satisfied," which they assert occurred after the sewer easement was signed and recorded. (See generally *Greco v. Oregon Mut. Fire Ins. Co.* (1961) 191 Cal.App.2d 674, 680 ["'It is the general rule that where conditions fixed for delivery of a deed are not such as are certain to happen, merely depositing the deed with an escrow holder does not pass title to the grantee'"].) For the purposes of our analysis, we will accept the Jarvises'

assertions that Boehringer signed and recorded the sewer easement before the close of escrow and before title formally passed to Hilton.[2]

A seller may not lawfully grant an easement over property during the escrow period without providing notice to the buyer. In *Koch v. Williams* (1961) 193 Cal.App.2d 537 (*Koch*), which the trial court cited in its statement of decision, Raymond Koch filed a complaint against Harry Williams "for claimed damage suffered by reason of an easement for drainage purposes granted fraudulently . . . over and across . . . [his] property . . . during the period of escrow and without plaintiff['s] knowledge." (*Id.* at p. 538.) The evidence at trial showed that Koch offered to purchase the property in question in June of 1957. In October of the same year, Williams executed a grant deed to the property that did not include "any indication . . . that the property was subject to any such easement." (*Id.* at p. 539.) Both parties then signed escrow instructions which also contained "no indication of any such easement." (*Ibid.*) On December 13, 1957, Williams, acting "outside of escrow and without [Koch's] knowledge" (*ibid.*), granted a drainage easement over the property to the city of National City. Escrow closed several weeks later and Koch took possession of the property with no knowledge of the easement. Koch prevailed at trial and was awarded fraud damages in the sum of $1,000. Williams appealed the judgment, arguing in part that Koch had failed to establish a fraud claim.

The appellate court affirmed, explaining that Williams' act of granting an easement during the escrow period without notifying Koch or "giv[ing him] the opportunity to reject the proposal or sale . . . under these conditions" (*Koch, supra,* 193 Cal.App.2d. at p. 541), qualified as a form of fraud: "'[T]he 'suppression by defendants

---

[2] The record demonstrates that Boehringer signed the grant deed transferring ownership of the North Kings property to Hilton over a month before he signed and recorded the sewer easement. Although the Jarvises allege that this deed was not delivered to Hilton until after the close of an escrow period, it has not cited any evidence demonstrating that the parties actually placed the grant deed in a conditional escrow, the terms of the purported escrow or the date on which the escrow actually closed.

of knowledge of an easement acquired during the pendency of the escrow which materially effected [*sic*] the property constituted actual fraud when they failed to disclose such knowledge to the plaintiff[].'" (*Ibid*.)

Koch demonstrates that Boehringer's grant of the sewer easement amounted to an act of fraud. As in *Koch*, Boehringer entered into a contract to sell the North Kings property to Hilton. During the escrow period, Boehringer signed a grant deed to the North Kings property that did not indicate the property was burdened by a sewer easement. Later in the escrow period, Boehringer granted an easement over the North Kings property to himself, as owner of the Harold Way property. Hilton's real estate agent, who represented her in the transaction, testified that Boehringer failed to notify him of the sewer easement at any time prior to the close of the escrow.

Because Boehringer's grant of the sewer easement amounts to an act of fraud, the conveyance is void as to the Kientzs. Under Civil Code section 1227, "[e]very instrument . . . affecting an estate in real property . . . made with intent to defraud prior or subsequent purchasers thereof . . . is void against [any] purchaser . . . of the same property." Civil Code section 1228, in turn, states that such an instrument will not be voided "in favor of a subsequent purchaser . . . who takes his or her interest . . . with notice unless the person who receives the benefit of the instrument was privy to the fraud." (3 Miller & Starr, Cal. Real Est. (3d ed. 2001) § 8:54 [citing and quoting Civ. Code §§, 1227-1228].) Here, the evidence at trial showed that Boehringer's grant of the sewer easement was fraudulent and therefore void under section 1227. However, because the easement was recorded in 2004, the Kientzs had constructive notice of the instrument prior to purchasing the North Kings property. Therefore, under section 1228, the easement was only void as to them if "the person who received the benefit of [the instrument] was privy to the fraud." At the time Boehringer granted the sewer easement, he was the owner of the property that benefitted from the easement. As both the grantor and the grantee, he was also privy to the fraudulent grant. The instrument was therefore void as to all subsequent purchasers, including those who, like the Kientzs, had prior notice of the instrument.

The Jarvises, however, raise three arguments why we should not apply *Koch* under the circumstances presented here. First, they assert that the Kientzs did not provide sufficient evidence to support the trial court's finding that Boehringer failed to notify Hilton of the sewer easement during the escrow period. However, as the party asserting a right to the easement, the Jarvises had the burden to prove the easement was enforceable, which required a showing that Hilton had knowledge of the easement. (*O'Dea, supra,* 139 Cal.App.2d at p. 661.) The Jarvises offered no evidence indicating that Hilton was informed or otherwise put on notice of the sewer easement.

The Jarvises' argument also overlooks the deferential standard of review we apply to the trial court's factual findings: "'"In general, in reviewing a judgment based upon a statement of decision following a bench trial, 'any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision. [Citations.]' [Citation.] In a substantial evidence challenge to a judgment, the appellate court will 'consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.]' [Citation.] We may not reweigh the evidence and are bound by the trial court's credibility determinations. [Citations.] Moreover, findings of fact are liberally construed to support the judgment. [Citation.]"' [Citations.]" (*Axis Surplus Ins. Co. v. Reinoso* (2012) 208 Cal.App.4th 181, 189.)

The evidence at trial showed that the grant deed transferring the North Kings property from Boehringer to Hilton listed the landscape easement that benefitted the property, but it did not include any reference to the sewer easement. Hilton's real estate agent, who represented her in the sale and was the only trial witness who had knowledge of the transaction, testified that he was never informed of the easement. He also stated that, to his knowledge, Hilton was never told about the easement. The Jarvises offered no documentary or testimonial evidence to rebut these assertions. This evidence is sufficient to support the trial court's finding that Hilton was not provided notice.

The Jarvises next argue that, even if Hilton had no prior notice of the sewer easement, "any claim that she might have against . . . Boehringer for failure to deliver title to the [North Kings] Property free and clear of encumbrances, does not pass to Respondents[.]" In support, the Jarvises cite case law indicating that "covenants that land is free from encumbrances" are "personal covenants" that do "not run[] with the land and . . . do not entitle a succeeding grantee to maintain an action in his own name for their breach." (*Babb v. Weemer* (1964) 225 Cal.App.2d 546, 550.) The Kientzs, however, have not sued Boehringer for breaching any covenant that the North Kings property was free from encumbrances. Rather, they have brought an action seeking a determination that the sewer easement is unenforceable because it was fraudulently conveyed at its inception. The case law cited by the Jarvises has no relevance to the claims at issue in this case. Finally, the Jarvises argue that the sewer easement is enforceable against the Kientzs because it was recorded, thereby giving them constructive notice of the servitude prior to their purchase. As discussed above, however, Civil Code section 1228 makes clear that a fraudulent grant is void to all subsequent purchasers – including those who had prior notice – if the party who benefitted from the grant was privy to the fraudulent act. Boehringer was the beneficiary of the fraudulent grant and he was the party that perpetrated the act. As a result, the easement is void as to the Kientzs regardless of its recordation. (See also *Wutzke v. Bill Reid Painting Service, Inc.* (1984) 151 Cal.App.3d 36, 44 fn. 4 ["The rule is well established that where the 'conveying instrument is void . . . it does not gain efficacy by recordation even in favor of an alleged party taking in good faith, for value, and without notice.' [Citation.] . . . '[R]ecording [cannot] give validity to a void deed or mortgage. . . . Recording places on file, in a public place, the written evidence of a conveyance; if that conveyance was void . . . it is void still.' [Citation.]"].)

4. The Trial Court Erred in Ruling that the Jarvises Presented and Failed to Prove a Claim for Easement by Necessity

The Jarvises argue that the trial court erred in ruling that they failed to establish an easement by necessity. The Jarvises contend that their cross-complaint did not assert a

claim for easement by necessity and, as a result, it was improper for the court to address that claim.

The trial court's minute order indicated that it could not determine if the Jarvises were entitled to an easement by necessity because no evidence had been presented on the issue. In its judgment and statement of decision, however, the court ruled that the Jarvises failed to establish an easement by necessity because they "offered insufficient evidence of their inability to hook up with a sewer and/or utility lines on Harold Way," and failed to "demonstrate[] a severe hardship or excessive costs to connect the sewer utility lines to any connections on Harold Way."

As the Kientzs conceded in their trial documents, "[t]he [Jarvises'] Cross-Complaint relies solely on a recorded Easement Agreement for Sewer and Utility Lines that was granted by Boehringer to himself." Their cross-complaint does not include a claim for easement by necessity nor does it reference any of the elements necessary to establish an easement by necessity. The Kientzs, in turn, never filed a cross-claim seeking a determination as to whether the Jarvises had an easement by necessity. Because neither party pleaded a claim for an easement by necessity, it was improper for the court to decide such a claim. (See *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1342 [trial court lacked authority to decide claim not asserted in cross-complaint].)[3]

We do not agree, however, with the Jarvises' proposed remedy for this error. The Jarvises contend that, on remand, they should be permitted to "fully present their claim that they have an easement by necessity." Because the Jarvises never claimed an easement by necessity, there is no basis to allow them to pursue the claim on remand.

---

[3] The Kientzs insist that the claim was placed at issue by the fact that their amended trial brief argued that the Jarvises could not demonstrate an easement by necessity. The Kientzs offer no legal authority – and we are aware of none – suggesting that a trial court may address a claim referenced in a trial brief that does not appear in the operative pleadings and that was not pursued by either party at trial.

The proper remedy is the removal of the language in the judgment that references an easement by necessity.

C. The Trial Court's Attorneys' Fees Order is Reversed and Remanded

The Jarvises also appeal the trial court's order awarding the Kientzs attorneys' fees and costs. The landscape easement contains a provision stating that, "[i]n the event of any controversy, claim or dispute relating to this Agreement, or the breach thereof, the prevailing party shall be entitled to recover from the losing party reasonable costs, expenses and attorneys fees." During the trial court proceedings, the Kientzs argued that the easement agreement qualified as a "contract" within the meaning of Civil Code section 1717, which directs the trial court to award attorneys' fees to the "prevailing party" in "any action on a contract" that contains an attorneys' fees provision.[4] The Jarvises did not dispute that that the landscape easement qualified as a contract within the meaning of section 1717 (see *generally In re Tobacco Cases I* (2011) 193 Cal.App.4th 1591, 1601-1602 (*Tobacco Cases*) ["section 1717 broadly applies to any dispute involving a written agreement"]), but argued that neither party had "prevailed" within the meaning of the statute. The trial court ruled that the Kientzs had prevailed and awarded them approximately $125,000 in attorneys' fees and $21,000 in costs.

Section 1717, subdivision (b)(2) states that "the prevailing party on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract." Therefore, "in instances of mixed results the court has discretion to find no party prevailed." (*Tobacco Cases, supra*, 193 Cal.App.4th at p. 1599.) "'[I]n deciding whether there is a "party

---

[4] Section 1717, subdivision (a) states: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

prevailing on the contract," the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources.' [Citation.]" (*Scott Co. of California v. Blount, Inc*. (1999) 20 Cal.4th 1103, 1109.)

In light of the fact that we have reversed portions of the trial court's judgment that favored the Kientzs, the order granting attorneys' fees and costs must also be reversed. If either party elects to seek attorneys' fees on remand, the trial court's determination of prevailing party on the landscape easement claim must follow the entry of judgment on remand and must be based on the more limited results obtained in the new judgment.

DISPOSITION

The judgment is reversed to the extent that it: (1) excludes mature trees from the "trim/prune" provision appearing in paragraph 4, subdivision (ii) of the landscape easement; (2) characterizes the landscape as exclusive, rather than non-exclusive in nature; (3) addresses whether the Jarvises have established an easement by necessity. The judgment is affirmed in all other respects. The trial court shall enter a new judgment consistent with this opinion. The trial court's order awarding attorneys' fees is reversed and remanded for further proceedings. The parties shall bear their own costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.